Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELL OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether liability for "arranging" for disposal of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(3), may be imposed upon a manufacturer who merely sells and ships, by common carrier, a commercially useful product, transferring ownership and control to a purchaser who then causes contamination involving that product.

2. Whether joint and several liability may be imposed upon several potentially responsible parties under CERCLA, 42 U.S.C. § 9607(a), even where a district court finds an objectively reasonable basis for divisibility that would suffice at common law.

PARTIES AND RULE 29.6 STATEMENT

Shell Oil Company is a wholly owned subsidiary of Shell Petroleum, Inc.

Also petitioning from the decision below, by separate petition for certiorari, are:

The Burlington Northern and Santa Fe Railway Company, successor in interest to the Atchison, Topeka & Santa Fe Railway Co. and now named BNSF Railway Company, is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation; and

Union Pacific Railroad Company, formerly Southern Pacific Transportation Company, is majority owned by Union Pacific Corporation, which also wholly owns Southern Pacific Rail Corporation.

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit and the eight-judge dissent from the denial of rehearing en banc (Pet. App. 1a-76a) are reported at 520 F.3d 918. The opinion of the district court (Pet. App. 77a-265a) is available at 2003 WL 25518047.

JURISDICTION

The Ninth Circuit entered its amended judgment and denied the petitions for rehearing en banc on March 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, are reproduced in the Appendix (Pet. App. 266a-267a)

STATEMENT OF THE CASE

The decision below, in conflict with decisions of other circuits, extends liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, to an unprecedented extent in two respects. First, it imposes "arranger" liability under CERCLA upon manufacturers that merely sell and ship, by common carrier, useful products (not waste) to customers who acquire control and ownership of those products upon the common carrier's arrival and then cause contamination with those products through sloppy operations. Second, it holds a manufacturer and property owners with only a remote connection to that contamination jointly and severally liable under CERCLA for indivisible harm, even though a district court found an objectively reasonable basis for calculating apportionment of fault. The decision below creates or contributes to splits of authority among the circuit courts on both issues. In light of the enormous dollar volume of CERCLA litigation and the frequent insolvency of the primary polluters of contaminated sites, the Ninth Circuit's novel expansion of CERCLA liability raises issues of national importance both for property owners and for manufacturers of chemicals and other routinely shipped commercial products.

The case arises from the contamination of a facility for the storage, sale and application of agricultural chemicals in Arvin, California. The now insolvent

operator of the facility, Brown & Bryant ("B&B") used sloppy processes that allowed leakages of chemical products to penetrate groundwater beneath the site. Shell Oil Company ("Shell") manufactured, sold and delivered by common carrier to B&B one of the chemicals that B&B stored, sold and applied at the facility. Two railroad companies, Burlington Northern & Santa Fe Railway Co. and Union Pacific Transportation Co. (collectively, the "Railroads"), owned a small parcel of land at the site that they leased to B&B.

Neither Shell nor the Railroads participated in B&B's operations or sloppy handling of chemicals. The sole basis for this CERCLA action against Shell is the claim that it supposedly "*arranged* for disposal or treatment . . . of hazardous substances [it] owned or possessed." 42 U.S.C. § 9607(a)(3) (emphasis added). CERCLA liability against the Railroads here rests on their status as "the *owner[s]* . . . of a . . . facility" where hazardous substances were disposed of. 42 U.S.C. § 9607(a)(1)&(2) (emphasis added). The district court found both Shell and the Railroads liable under CERCLA but apportioned liability, assigning them 9% and 6% respectively. A panel of the Ninth Circuit affirmed as to liability but reversed as to apportionment, holding both Shell and the Railroads jointly and severally liable for cleanup of the entire site.

A. Statutory Background

CERCLA provides a cause of action to recover the costs of responding to the release of hazardous substances into the environment from a "facility" at which they have been disposed of. CERCLA specifies that such recovery is permitted only from four categories of "potentially responsible parties":

> (1) the owner and operator of . . . a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . , and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.

42 U.S.C. § 9607(a). Manufacturers of useful products are not listed among such potentially responsible parties. Congress instead chose in CERCLA to deal with manufacturers of useful products by taxing them for contributions to the Hazardous Substance Superfund. *See* 42 U.S.C. §§ 4611, 4661 & 4662.

Expressly incorporating definitions from the Solid Waste Disposal Act, *see* 42 U.S.C. § 9601(29), CERCLA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land . . . so that [it] may enter the environment . . . ," and defines "treatment" as "any method, technique or process . . . designed to change . . . hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous . . . ." 42 U.S.C. §§ 6903(3), 6903(34).

CERCLA does not define the term "arranged," nor specify whether or how liability among several entities at any site may be apportioned.

B. Factual Background

B&B, now defunct, owned and operated an agricultural chemical storage, sale and application facility in

Arvin, California, from 1960 to 1988. Halfway through this period, in 1975, B&B leased a .9-acre parcel of land from the Railroads' predecessors in interest, using it to store fertilizer rigs. The railroad parcel together with B&B's parcel comprised a total site of 4.7 acres. During its 29 years of operation, B&B engaged in sloppy handling of chemical products that contaminated its facility, including by rinsing hazardous chemicals into an unlined sump that funneled contamination into the underlying groundwater.

Shell was one of the manufacturers from whom B&B purchased chemicals. Shell sold B&B a soil fumigant called D-D—a nematocide that is injected into soil to protect crop roots from attack by microscopic worms. D-D was sold as a new product in final form to B&B, which in turn either sold the product to its customers or applied it to farmland for them. Shell did not sell D-D to B&B on consignment and B&B did not have to formulate D-D for use. Shell delivered D-D to B&B in bulk shipments via common carrier tank truck, and all sales were "FOB Destination," meaning that title, ownership and control passed to B&B when the common carrier arrived at the B&B facility. The sales contracts expressly provided that B&B would provide safe and adequate "facilities for receiving and storing all Products delivered" and shall "unload all deliveries promptly and at [B&B's] own risk and expense." Pet. App. 210a.

B&B spilled some small quantities of D-D in the process of unloading deliveries and transferring the chemical from the common carrier tank trucks into B&B's bulk storage tanks. B&B also spilled D-D after delivery when it transferred the chemical from

its storage tanks to its nurse tanks, rigs and bobtail trucks, and when it rinsed D-D onto the ground in the course of washing out this equipment. While D-D was a volatile chemical that normally vaporized upon use, B&B's use of an unlined sump to collect rinsewater helped act as a conduit for D-D and other hazardous substances to find their way into the underlying groundwater.

C. Proceedings Below

In the early 1980s, the United States Environmental Protection Agency ("EPA") and California's Department of Toxic Substances Control ("DTSC") found evidence of soil and groundwater contamination at B&B's facility. In 1988, the government agencies issued a remediation order, the costs of which drove B&B into insolvency. In 1996, EPA and California filed CERCLA actions against Shell and the Railroads for reimbursement of the remaining investigation and clean-up expenses at the Arvin facility.

The District Court for the Eastern District of California (Wanger, J.), after a bench trial, issued detailed findings in a 191-page opinion. Pet. App. 77a-265a. The district court found both Shell and the Railroads liable under CERCLA but found the harm to the site divisible and found each of them responsible only for a portion of that harm. The railroads were found liable based on the fact that they owned land that was part of the Arvin facility at the time of disposal of hazardous chemicals. *See* 42 U.S.C. § 9607(a)(1) and (2). The district court held Shell liable as an entity that supposedly "arranged" for the disposal of hazardous substances at the facility. *See* 42 U.S.C. § 9607(a)(3).

The district court rejected Shell's argument that it could not be an "arranger" of waste disposal under CERCLA merely because it sold useful products FOB Destination by common carrier. The district court conceded that "Shell did not retain ownership of its products after delivery to B&B," but suggested that it was sufficient for arranger liability that "Shell knew that spills were inherent in the transfer to storage tank, delivery-unloading process." Pet. App. 208a, 214a.

Having found Shell and the Railroads liable under CERCLA, the district court found that there was a reasonable basis for apportioning responsibility, applying the test of Restatement (Second) of Torts § 433A. As the district court stated, "this is a classic 'divisible in terms of degree' case, both as to the time period in which defendant's conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination." Pet. App. 241a.

As to the Railroads, the district court examined the activities that took place on each portion of the facility, and found that releases at the parcel owned by the Railroads could not have contributed more than 10% of the overall site contamination. It also concluded that the primary sources of groundwater contamination at the facility were all located on B&B's parcel. The court apportioned the harm by multiplying the percentage of the overall land that was owned by the Railroads (19.1%), the percentage of the 29 years of B&B's operations during which it leased land from the Railroads (45%), and a discount for the fact that only two of the three hazardous products were ever stored on the Railroads' land

(66%), arriving at an initial figure of 6%. Pet. App. 254a-255a. The court then increased that figure by half to be conservative, assigning 9% of the total liability to the Railroads. Pet. App. 255a.

As to Shell, based on extensive direct evidence presented at trial, the district court calculated the volume of spillage of Shell's product D-D during bulk deliveries and compared it with the total volume of spillage of chemicals throughout the facility from the combined activities of delivery, storage, transfer, and equipment rinsing. Based on these calculations, the court concluded that Shell's divisible share was 6%. Pet. App. 255a-260a.

In an opinion filed March 16, 2007, a panel of the Ninth Circuit affirmed the district court's finding that Shell was liable as an "arranger," but reversed the district court's divisibility determination and instead imposed joint and several liability on Shell and the Railroads for the entire cost of cleanup at the Arvin facility.

On May 7, 2007, both Shell and the Railroads filed petitions for rehearing and rehearing en banc. On September 4, 2007, the panel amended its opinion to make several corrections, including to hold that Shell was not responsible for contamination caused at the "Dinoseb hot spot" as Dinoseb was produced by Dow, not Shell.

On March 25, 2008, the Ninth Circuit denied rehearing en banc, although the panel further amended some of the language in its opinion and issued an amended final decision. Pet. App. 1a-74a. Eight judges dissented from the denial of rehearing en banc. Pet. App. 52a-75a.

D. The Decision Below

The final decision of the Ninth Circuit panel (Berzon, J., joined by B. Fletcher, J., and Gibson, J., sitting by designation), as twice amended, opened by expressing concern that the government "agencies were . . . left holding the bag for a great deal of money" in the Arvin site cleanup, Pet. App. 3a, and suggested that CERCLA's "key purpose" was to shift environmental cleanup costs away from taxpayers to available private entities. Pet. App. 9a. The panel likewise emphasized that "CERCLA seeks to distribute economic burdens," not allocate relative fault. Pet. App. 36a.

1. *Arranger Liability*

In affirming the district court's determination that Shell was liable as an "arranger" under 42 U.S.C. § 9607(a)(3), the panel asserted that arranger liability may be imposed when disposal of hazardous wastes is merely "a foreseeable byproduct of" a sale of hazardous substances that later will be disposed of. Pet. App. 42a. Noting that "'*disposal*' need not be purposeful" because it "includes such unintentional processes as 'leaking,'" the panel suggested that it followed that "an entity can be an *arranger* even if it did not intend to dispose of the product." Pet. App. 44a (emphasis added).

The panel acknowledged that prior decisions had "refused to hold manufacturers liable as arrangers for selling a useful product containing or generating hazardous substances that *later* were disposed of." Pet. App. 45a (emphasis in original). But the panel purported to distinguish those cases from this case on the ground that here, "the sale of a useful product

necessarily and immediately results in the leakages of hazardous substances." Pet. App. 45a.

The panel likewise acknowledged but declined to follow decisions in its own and other circuits holding "that ownership or control at the time of transfer are the sine qua non of nontraditional arranger liability." Pet. App. 48a. To the contrary, the panel concluded, "[h]ere, ownership at the time of disposal is not an informative consideration," and it "need not determine the precise moment when ownership transferred to B&B." Pet. App. 49a. Even if B&B owned the D-D once the common carrier arrived at its facility, the panel suggested, Shell still could be liable as an arranger under CERCLA merely because spills always occurred when deliveries were made, Shell arranged for transport by common carrier tank trucks, and Shell gave B&B instructions, checklists and rebates to encourage safe handling. Pet. App. 47a. It was sufficient, according to the panel, that "Shell arranged for the sale and transfer of chemicals under circumstances in which a known, inherent part of that transfer was the leakage, and so the disposal, of those chemicals"—even if Shell did not own those chemicals or control that leakage. Pet. App. 50a.

2. *Apportionment*

Following the approach of other circuits, the Ninth Circuit panel accepted that "apportionment is available at the liability stage in CERCLA cases," and agreed that it is appropriate to look "to common law principles of tort in general, and the Restatement in particular," to determine when to impose joint and several liability and when, and if so, how to apportion fault. Pet. App. 15a. The panel also agreed with other circuits, following the Restatement, "that harm may be apportioned when 'there exists a reasonable

basis for divisibility' of a single harm." Pet. App. 16a (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)). Finally, the panel agreed with other circuits that divisibility may be established by volumetric, chronological or geographic criteria. Pet. App. 16a n.18.

The panel nonetheless proceeded to reject the district court's findings based on just such criteria as legally insufficient, and to reverse the district court's apportionment ruling as to both Shell and the Railroads. Pet. App. 40a-41a, 36a-37a. Despite the district court's 191-page opinion including 80 pages of fact findings, the panel held that the district court had failed to establish a "reasonable estimate" or "reasonable basis" for connecting Shell or the Railroads to relevant harms. Pet. App. 16a n.18, 37a, 41a.

As to the Railroads' share of liability, the panel faulted the district court as a matter of law for using "a 'meat-axe' approach . . . premised on percentages of land ownership," and a "simple fraction based on the time that the Railroads owned the land." Pet. App. 34a, 35a. The panel suggested that only much more detailed records establishing the Railroads' relative contribution to contamination would suffice. The panel conceded that a landowner will often have no such documentation, and thus acknowledged that the perverse result of its approach "may be that landowner PRPs, who typically have the least direct involvement in generating the contamination, will be the least able to prove divisibility." Pet. App. 36a.

As to Shell's share of liability, the panel conceded that "there is *some* volumetric basis for comparing its contribution to the total volume of contamination on the Arvin site," but held that a pro rata share of

leakage is an insufficient proxy for a pro rata share of contamination remaining and requiring cleanup on the site. Pet. App. 37a-38a. The panel faulted the district court for failing to account for "the possibility that leakage of one chemical might contribute to more contamination than leakage of another" or that "some contaminants are more expensive than others to extract from the soil." Pet. App. 38a.

E. The Dissent from Denial of Rehearing En Banc

Upon the Ninth Circuit's denial of rehearing en banc, Judge Bea, joined by Chief Judge Kozinski and Judges O'Scannlain, Kleinfeld, Gould, Tallman, Callahan and N.R. Smith, wrote a detailed and vigorous dissent. He began by noting that the panel's interpretation of arranger liability "creates . . . inter-circuit conflicts in an area of the law where uniformity among circuits is of paramount importance," and that the panel's apportionment standard was "novel and unprecedented" and imposed "impossible-to-satisfy burdens on CERCLA defendants." Pet. App. 52a.

As to arranger liability, the dissent found that, "[b]y imposing arranger liability on a mere seller, the panel stretches the meaning of arranger liability beyond any cognizable limit and creates inter-circuit splits." Pet. App. 71a. Finding the panel's interpretation inconsistent with the statutory text, Judge Bea noted that, even if "*disposal*" includes unintentional processes like spilling and leaking, "arranger liability requires the defendant to have '*arranged* for' such disposal," and noted further that arrangement "connotes an intentional action" aimed at disposal rather than merely at sale. Pet. App. 70a (emphasis altered). The dissent further noted that the panel's

interpretation of arranger liability conflicts with decisions of other circuits that have held "that the mere sale of a product is not 'arranging for disposal'" under CERCLA. Pet. App. 71a (quoting *AM Int'l, Inc. v. International Forging Equipment Corp.*, 982 F.2d 989, 999 (6th Cir. 1993)). Finally, the dissent reasoned that, at a minimum, arranger liability requires actual control over hazardous waste disposal, and that here, where "Shell relinquished control over the D-D once the common carrier arrived at the B&B site," no such actual control could be established. Pet. App. 73a.

As to apportionment, the dissent stated that the panel had paid mere "lip-service" to the correct common law principle, reflected in the Restatement, that only a reasonable estimate of apportionment is required in order to impose several rather than joint and several liability. Pet. App. 53a. The dissent reasoned that the panel had made that standard impossible to satisfy as a practical matter. As to the railroads, the panel had required "'perfect information' sufficient to trace every molecule of pollution to the landlord's parcel." Pet. App. 53a-54a. As to Shell, the panel had required such stringent proof of divisible shares that it had imposed joint and several liability on Shell for spillage of chemicals it had not even sold. Pet. App. 73a-74a n.32.

REASONS FOR GRANTING THE WRIT

As eight judges of the Ninth Circuit stated in dissenting from that court's denial of en banc rehearing, "The panel decision creates disorder in CERCLA jurisprudence by causing . . . inter-circuit conflicts in an area where uniformity over the interpretation of the federal statutory law, based on common law principles, is of the utmost importance."

Pet. App.74a. Only review by this Court can dispel this disorder and restore appropriate uniformity to CERCLA jurisprudence.

The Ninth Circuit created a split among the circuits, first, by extending "arranger" liability under CERCLA to a manufacturer that merely sells a useful product (not waste), transports it to a purchaser by common carrier, and transfers ownership and control of that product to the purchaser once the common carrier arrives. This decision both contradicts the plain language of the statute and poses the threat of startling new CERCLA liability for the thousands of companies that ship chemicals and other products routinely in commerce by common carrier.

The Ninth Circuit also deepened an inter-circuit split on the interpretation of CERCLA apportionment. Under the leading approach favored in other circuits, a reasonable estimate of relative fault based on objective evidence is sufficient, as it would be under common law. Under the Ninth Circuit's approach, by contrast, a property owner or manufacturer must offer virtually perfect information before relative fault may be apportioned. The Ninth Circuit thus imposes a practically insurmountable burden upon CERCLA defendants seeking to show that harm should be prorated among several entities with different degrees of relationship to a contaminated site. This approach transforms CERCLA, against the intent of Congress, into a regime of de facto mandatory joint and several liability.

The combined effect of these two erroneous departures from the settled law of other circuits is especially devastating for sellers of chemical and other products that may be mishandled by pur-

chasers after sale: as the en banc dissent noted, "under the panel's novel definition of 'arranger' liability," and without any realistic chance of apportionment based on reasonable estimates of relative fault, "sellers of chemical products will be saddled with the *entire clean-up cost* of a facility contaminated in part with their products, even if they lacked control over the products spilled following the sale." Pet. App. 75a (emphasis added). Whatever the merit of driving actual polluters into bankruptcy under the Superfund statute, there is no evidence that Congress intended such a result for companies that merely sell useful products to those polluters and ship them by common carrier.

This Court should grant this petition as well as the separate petition for certiorari filed by the Railroads, and consolidate both petitions for argument.

I. THE NINTH CIRCUIT'S IMPOSITION OF "ARRANGER" LIABILITY UNDER CERCLA FOR THE MERE SALE OF A COMMERCIALLY USEFUL PRODUCT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The decision below for the first time allows a chemical manufacturer to be found liable as an "arranger" under 42 U.S.C. § 9607(a)(3) merely for shipping commercially useful products, by common carrier, to a purchaser that in turn allowed that product to leak or spill upon the ground after acquiring ownership and actual control. No other circuit has given such broad scope to arranger liability. To the contrary, the decision below conflicts with the decision of every other circuit that has considered the

scope of arranger liability for manufacturers of commercially useful products.

Specifically, no other circuit has found a manufacturer liable under CERCLA as an arranger of hazardous substance disposal where, as here, that manufacturer sells (1) a new useful product manufactured for sale (2) that is shipped by common carrier with delivery FOB destination, so that (3) title, possession and ownership are transferred to the purchaser when the common carrier arrives, and thus (4) the manufacturer lacks ownership or actual control of the product that is spilled or leaked into the environment. To the contrary, every circuit that has addressed arranger liability claims against manufacturers of useful products has rejected those claims unless the manufacturer, unlike here, had ownership or actual control of those products when disposed of as waste.

A decision by the Seventh Circuit rejecting arranger liability under 42 U.S.C. § 9607(a)(3) on facts very similar to those here vividly illustrates this circuit conflict. In *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) (Posner, J.), the Seventh Circuit held that a chemical manufacturer may not be held liable as an arranger where it ships chemicals by common carrier to a purchaser that spills them while transferring them into storage tanks, causing the underlying groundwater to become contaminated. Writing for the court, Judge Posner concluded that, "when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute." *Id.* at 751. The decision below is squarely

in conflict with this holding, which it does not mention or attempt to distinguish.

In reaching this conclusion, the Seventh Circuit construed the text of the statute in virtually the opposite manner from the Ninth Circuit. The Ninth Circuit panel held that, because "*disposal*" may "include[] such unintentional processes as 'leaking,'" it follows that "an entity can be an *arranger* even if it did not intend to dispose of the product" as waste. Pet. App. 44a (emphasis added). By contrast, Judge Posner reasoned that the chemical manufacturer in *Amcast* (Detrex) could not have arranged for disposal of the chemical (TCE) that was spilled by the common carrier (Transport Services) unless it had hired trucks to "carry the stuff" to the customer (Elkhart) with the intent that those chemicals would be spilled upon the ground—a hypothesis he deemed absurd:

> Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises. Although the statute defines *disposal* to include spilling, the critical words for present purposes are "*arranged for*." The words imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground. No one *arranges* for an accident. . . .

Amcast, 2 F.3d at 751 (emphasis added). Judge Posner's opinion further noted that "[i]t would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers . . . that the shippers had hired in good faith to ship their products." *Id.*

Like the Seventh Circuit, the Second, Fourth, Sixth and Eleventh Circuits have ruled, in conflict with the decision below, that arranger liability may not be imposed upon the sale of useful products in the absence of ownership or actual control:

In *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999), the Second Circuit held that a defendant manufacturer was not liable as an arranger for the clean-up of chemicals sold to a purchaser who had opened some of them in its laboratory while relocating, *id.* at 162, concluding that "[t]here is no evidence in the record before us to support an inference that the transaction at issue was anything more than a sale," *id.* at 164.

In *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998), the Fourth Circuit held that railroads selling used journal bearings to a foundry for processing into new journal bearings were not liable as arrangers for contamination at the foundry because "the conversion agreements between the [f]oundry and the [railroads] were not transactions for disposal," and "the removal of contaminants was not the purpose of the transaction." *Id.* at 775. The court there noted the importance of distinguishing "whether a transaction was for the discard of hazardous substances or for the sale of valuable materials." *Id.*

In *AM Int'l, Inc. v. International Forging Equipment Corp.*, 982 F.2d 989 (6th Cir. 1993), the Sixth Circuit held that the seller of a manufacturing facility, including chemicals used in manufacturing on an "as is, where is" basis, was not liable as an arranger, noting that "courts . . . have consistently held that the mere sale of a product is not 'arranging for disposal' under the statute." *Id.* at 992, 999.

And in *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990), the Eleventh Circuit held that sellers of transformers containing a hazardous substance were not arrangers. The court noted that, "[i]f a party merely sells a product, without additional evidence that the transaction includes an 'arrangement' for the ultimate disposal of a hazardous substance, CERCLA liability would not be imposed." *Id.* at 1317. The Court concluded as a matter of law that "the transactions involved [nothing] more than a mere sale." *Id.* at 1319. In particular, the court held that "[n]othing in the record supports an inference that the manufacturers arranged for the disposal of hazardous waste by selling the transformers." *Id.*

The Ninth Circuit panel's definition of arranger liability conflicts with each of these decisions by other circuits; indeed it conflicts even with prior authority in the Ninth Circuit itself, which had held, in a case involving the potential "arranger" liability of the United States government, that "control is a crucial element of the determination of whether a party is an arranger." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002) (W. Fletcher, J.); *see id.* at 1058 (noting that it is "the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances, that makes an entity an arranger under CERCLA's liability provision") (quoting *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (emphasis omitted)).[1]

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[1] The panel sought to distinguish the *Shell* decision on the ground that the federal government there was a buyer rather than a seller, *see* Pet. App. 43a n.33, but it is difficult to see why

The panel decision likewise conflicts with the rulings of other circuits in holding that a seller may be liable as an arranger for "unintentional processes" that "need not be purposeful," regardless of the seller's intent and regardless of who is responsible for causing the leakage. Pet. App. 44a. Like the Seventh Circuit in *Amcast* as discussed above, the Sixth Circuit has held that intent to dispose of hazardous substances is the touchstone of arranger liability. In *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996), the court considered whether parties returning 55-gallon drums to their solvent supplier intended, by return of the drums, to enter into an arrangement for disposal of residual solvent in the drums. The court held that a person subject to arranger liability must have "intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances," and that no such intent was present there. *Id.* at 1231. *See also United States v. CDMG Realty*, 96 F.3d 706, 714 (3d Cir. 1996) (noting that, when read alongside the term "disposing," the terms "'leaking' and 'spilling' should be read to require affirmative human action."). The Ninth Circuit's novel interpretation of CERCLA cannot be reconciled with these decisions.[2]

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that makes any difference to the holding that actual "control," at a minimum, is a prerequisite to statutory arranger status.

[2] To be sure, arranger liability under 42 U.S.C. § 9607(a)(3) may extend beyond traditional "direct arranger" liability for transactions entered into solely for the purpose of disposing of hazardous waste. So-called "broader arranger" liability has been imposed upon sales of waste thinly disguised by a marginal beneficial purpose. *See Cadillac Fairview/California Inc. v. United States*, 41 F.3d 562, 565-66 (9th Cir. 1994) (contaminated styrene returned by rubber manufacturers for re-distillation in exchange for account credits); *Catellus Devel. Corp. v.*

Against this backdrop, the panel decision represents a sharp departure from previous interpretation of CERCLA arranger liability as applied to the sale of useful products. Never before has arranger liability been imposed merely because spillage is a "foreseeable byproduct" of, or supposedly "inherent in," the process of delivering bulk chemicals or other products, as the panel held below. Certiorari is warranted in this case to resolve the resulting split among the federal circuits.

II. BY MAKING APPORTIONMENT PROHIBITIVELY DIFFICULT TO PROVE, THE NINTH CIRCUIT'S DECISION CONFLICTS WITH GOVERNING COMMON LAW PRINCIPLES AND WITH DECISIONS OF OTHER CIRCUITS.

It is well-settled that CERCLA allows apportionment of fault at the liability stage among potentially responsible parties. Congress considered making all CERCLA liability joint and several, but declined to do so out of concern that this might "impose financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury." 126 Cong. Rec. 30897, 30972

United States, 34 F.3d 748, 750-52 (9th Cir. 1994) (sale of spent batteries for extraction of lead plates). Broader arranger liability likewise has been upheld where a manufacturer sends a product to a formulation process that creates hazardous waste, but retains ownership and control throughout the process. *See United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1381-82 (8th Cir. 1989) (pesticide manufacturers used formulator to create commercial-grade pesticides that were then shipped back to them for sale or shipment to their customers). But the facts here, involving a sale wholly of a useful product, and the transfer of ownership at the facility gate, are entirely different.

(Nov. 24, 1980) (statement of Sen. Helms). As the leading early decision on this issue observed, Congress chose "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases." *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

Thus, while CERCLA as enacted is silent on apportionment, it is well accepted that Congress intended relative shares of liability to be governed by "traditional and evolving principles of common law," following the lead of § 433A of the Restatement (Second) of Torts. *Chem-Dyne*, 572 F. Supp. at 808. The Restatement provides that "[d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A. Commentary to the Restatement makes clear that a "reasonable basis" for apportionment may rest upon a practical approximation or estimate grounded in objective evidence and reasonable assumptions; it does not depend upon absolute precision, certainty or documentation. *Id.* "[W]here cattle of two or more owners trespass upon the plaintiff's land and destroy his crop," for example, the damage should "be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number." *Id.* at Comment d.

The Fifth, Sixth and Eighth Circuits have applied these Restatement principles faithfully to CERCLA apportionment, allowing division of fault at the liability stage to be guided by reasonable estimates and

assumptions and rejecting arguments that absolute certainty is required. In *In Re Bell Petroleum Services*, 3 F.3d 889, 904 n.19. (5th Cir. 1993), for example, the Fifth Circuit held that "a rough approximation is all that is required under the Restatement [(Second) of Torts]." As *Bell Petroleum* explains:

> Essentially, the question whether there is a reasonable basis for apportionment depends on whether there is sufficient evidence from which the court can determine the amount of harm caused by each defendant. If the expert testimony and other evidence establishes a factual basis for making a *reasonable estimate* that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances. The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability.

Id. at 903 (emphasis added).

On this point, the Sixth and Eighth Circuits are in accord with the Fifth. *See United States v. Hercules*, 247 F.3d at 719 (following *Bell Petroleum* and stating that "[a] defendant need not prove that its 'waste did not, or could not, contribute' to any of the harm at a CERCLA site"); *United States v. Township of Brighton*, 153 F.3d 307, 320 (6th Cir. 1998) (holding sufficient any "reasonably ascertainable" basis for apportionment). Those circuits specifically endorsed the very bases for approximation used by the district court in its detailed findings below. *See Hercules*, 247 F.3d at 719 (noting that it is "possible to prove divisibility of

single harms based on volumetric, chronological, or other types of evidence"); *Township of Brighton*, 153 F.3d at 320 (noting that "time seems the most obvious and probable way that an operator can show divisibility").

The Ninth Circuit panel below purported to apply these Restatement principles, but found "no reasonable basis for apportioning the defendants' harm" here despite the district court's meticulous calculations. Pet. App. 25a n.27. Observing "something of a circuit split on the degree of specificity of proof necessary to establish the amount of liability apportioned to each PRP," Pet. App. 40a n.32, the panel acknowledged that decisions like *Bell Petroleum* and *Hercules* "have permitted informal estimates or data rather than more exact calculations," while asserting that other decisions have been more demanding, citing, for example, *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 n.4 (8th Cir. 1995) (requiring "concrete and specific evidence" to support apportionment). The panel simply asserted that it "need not weigh in on this dispute," as in its view, "the district court's extrapolations could not be upheld under even a forgiving standard." Pet. App. 40a n.32.

This assertion, however, cannot be squared with the panel's actual ruling. In jettisoning the district court's detailed temporal, spatial and volumetric comparisons as insufficiently precise as a matter of law, the panel in effect placed itself on the strict side of the circuit split it identified, and exacerbated any existing circuit conflict with *Bell Petroleum* and its kin. Under the standard that governs in the Fifth, Sixth or Eighth Circuits, the district court's findings surely would have been upheld. As the dissent from denial of en banc rehearing put the point, the panel

paid mere "lip-service to the Restatement test" before proceeding "effectively to disregard it." Pet. App. 53a.

For example, the panel rejected as too simple the district court's careful volumetric comparison of the D-D spillage upon delivery with the spillage at the site overall as a reasonable basis for apportionment. The panel thus transformed the 6% pro rata liability imposed upon Shell by the district court into joint and several liability on Shell's part for 100% of the harm at the site—simply for having shipped chemicals to a purchaser by common carrier, FOB Destination. The panel held that percentages of leaks are an inadequate proxy for percentages of contamination, and suggested that the district court would have had to account for "the possibility that leakage of one chemical might contribute to more contamination than leakage of another" or that "some contaminants are more expensive than others to extract from the soil," in order to apportion Shell's share of liability at the Arvin site. Pet. App. 38a. But as Judge Bea and the other dissenters from denial of rehearing en banc observed, this is like saying that, in the Restatement cattle illustration, a court should have taken account of the fact that "one owner's cattle might have idly stood by while the rest destroyed the crops; one owner's cattle might have more heavy-footed bulls, and less lightfooted heifers." Pet. App. 64a.

In other words, the panel's standard for the specificity of proof required for CERCLA apportionment necessarily departs from the reasonable estimate standard set forth in the Restatement and followed in cases like *Bell Petroleum*. As further explained in the separate petition filed by the Railroads, this newly

strict Ninth Circuit proof standard for apportionment is virtually impossible for any CERCLA defendant to meet as a practical matter. It thus would transform CERCLA, under which Congress declined to impose mandatory joint and several liability, into a regime that virtually requires such indivisible fault. Because the Ninth Circuit decision departs from governing common law principles, contravenes Congress's intent, and splits from the decisions of other circuits, it warrants this court's review.

III. THE NINTH CIRCUIT'S EXPANSION OF CERCLA LIABILITY RAISES ISSUES OF NATIONAL IMPORTANCE REQUIRING GUIDANCE FROM THIS COURT.

The sheer magnitude of compliance costs under CERCLA underscores the importance of properly determining who potentially responsible parties are under CERCLA and properly apportioning liability among them. As of June 18, 2008, the EPA lists 1,255 Superfund sites and 60 proposed sites on its "National Priorities List," and an additional 326 sites have already been deleted from the list. *See* NPL Site Totals by Status, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm. Private party liability has recently been assessed as high as $250 million for a single site. *See* U.S. D.O.J. Press Release, W.R. Grace to Pay for Cleanup of Asbestos Contamination in Libby, Montana, http://www.usdoj.gov/opa/pr/2008/March/08_enrd_194.html.

In the first twenty-five years of the Superfund, EPA enforcement to clean up Superfund sites has resulted in aggregate private party funding commitments of nearly $24 billion. *See* Superfund's 25th Anniversary: Capturing the Past, Charting the

Future, http://www.epa.gov/superfund/25anniversary/index.htm. In 2007 alone, EPA enforcement of CERCLA resulted in agreements for responsible private parties to pay over $1 billion in remediation costs, including $314 million in costs to reimburse the EPA for past response and oversight. *See* Compliance and Enforcement Annual Results: FY2007 Numbers at a Glance, http://epa.gov/compliance/resources/reports/endofyear/eoy2007/2007numbers.html. In the same year, the Department of Justice recovered approximately $200 million for the Superfund to finance future cleanups and secured commitments for responsible parties to clean up sites at estimated costs in excess of $270 million. *See* U.S. D.O.J. Environmental and Natural Resources Division, Summary of Litigation Accomplishments, Fiscal Year 2007 at 6, *available at* http://www.usdoj.gov/enrd/Electronic_Reading_Room/ENRD_Litigation_Accomplishments_Report_for_Fiscal_Year_2007.PDF.

Given these levels of potential exposure, it is critical that private parties know when they may be engaged in activities that could result in CERCLA liability and the extent to which they could be held responsible for remediation costs. This is especially so because CERCLA liability drives many primary polluters into bankruptcy, leaving other solvent parties vulnerable to government attempts to reallocate the orphaned shares. The existence of different standards in different jurisdictions generates a situation in which potentially responsible parties cannot reasonably predict the consequences of their actions and thus cannot tailor their behavior accordingly. Recognizing the dangers of such uncertainty, all courts that have addressed the issue of CERCLA liability, including the Ninth Circuit, have identified the importance of national uniformity in the construction

of CERCLA. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (observing, in the CERCLA liability context, that "[f]ederal programs that by their nature are and must be uniform in character throughout the nation necessitate the formulation of federal rules of decision" (citation omitted)).

Even the panel below recognized as much, purporting to "follow *Chem-Dyne* and all the courts of appeals that have . . . [held] that the resulting standard must be a uniform federal rule," Pet. App. 15a (citing cases), and noting that "the legislative history of CERCLA supports such an approach, as does its policy of favoring national uniformity so as to discourage 'illegal dumping in states with lax liability laws.'" Pet. App. 15a (quoting *Chem-Dyne*, 572 F. Supp. at 809).

The decision below, however, in fact thwarts this objective of national uniformity. It creates a unique CERCLA liability scheme for the Ninth Circuit. In this regime, "arranger" liability is extended far beyond its reach in other jurisdictions, so that even manufacturers who merely ship useful products by common carrier can be held responsible for fully remediating contaminated sites. And in this regime, apportionment is so difficult to prove that CERCLA imposes virtually certain joint and several liability on even minor players with the most attenuated connection to any contamination. The Ninth Circuit should not be permitted to carve itself out of the CERCLA jurisprudence applicable to the rest of the Nation without this Court's review.

CONCLUSION

This Court should grant this petition as well as the separate petition for certiorari filed by the Railroads, and consolidate both petitions for argument.

Respectfully submitted,

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